No. 14,424

IN THE

United States Court of Appeals

For the Ninth Circuit

CASH COLE, et al.,
Appellants,

vs.

FAIRVIEW DEVELOPMENT, INC., et al.,
Appellees.

On Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

REPLY BRIEF OF APPELLANTS.

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REPLY STATEMENT OF CASE.

The statement of appellees, in their brief, is so misleading and confusing, that we deem it necessary to clarify many misleading statements. The following points out some of the major discrepancies, and page references are to appellees' brief.

Under Section A (1) pp. 9-10, appellees' brief, they attempt to support their statement that, negotiations to compromise the conflicting claims of the parties, as well as the claim of A. G. Rushlight, were undertaken at the suggestion of Nicolas Jaureguy, by citation to the transcript. However, it should be observed that the citations are almost all to affidavits of

parties adverse to appellant, or are distortions resulting from the lifting from the context of appellant's affidavits. It is true that the affidavits are part of the record, but the citation to such is misleading, and results in a defect that goes to the very heart of this case, namely, that *appellant is entitled to be heard in court on the issues involved here.* The affidavits are uncross-examined statements, and, as evidence, also violate the right of confrontation. Although sworn, appellant submits, that such statements are not sufficient evidence, upon which, a court should make a finding of fact.

On p. 9, appellees state: "Cash Cole himself indicated that he desired a settlement." (TR 154, 163, 167-168.) The reference to TR 154, apparently was referring to Cash Cole's statement, "and if there was a chance to settle, it should be attempted." This is a definite distortion of fact on the part of appellees, since the transcript clearly shows that the clause refers to a settlement of a $690,000.00 suit by Nowell against Mortensen, and in no way supported the above quotation from appellees' brief. (See transcript 154.)

The important thing to show in this particular section is that all of the appellees' alleged factual statements in this section are supported by material that, alone, is generally inadmissible as evidence.

Under Section A (2) pp. 10-11, the appellees' statement of the case is subject to the same vice as stated above, that is, that all citations to the transcript refer to affidavits with one exception in the reference

to the findings of fact by the court. It is difficult to see how such citations can be used in determining the facts in this case, as a matter of law, since they are to material that is uncross-examined, as indicated above.

Section A (3) pp. 11-13, by inference, indicates that Cash Cole was capable of transacting business shortly after his heart attack, and is misleading in that it indicates that the heart attack of appellant was "purported". The evidence was uncontroverted that appellant suffered a heart attack and not a "purported heart attack". This conclusively shows the prejudice of the trial judge. (TR 64, 94.) This particular section, too, refers to the transcript which, except for the findings of fact, consists of references to affidavits only.

Section A (4) pp. 13-14, infers inconsistencies on the appellant's part concerning the understanding of settlement by appellant's family, and refers to two affidavits of appellant. However, the first (TR 60) was executed on January 7, 1954, and the second was executed on February 26, 1954, approximately seven weeks later. (TR 156.) The only inconsistency shown by appellees is their failure to point out the time lapse between the execution dates of the affidavits referred to. They could not, of course, be expected to point out that appellant's first affidavit was that of a very sick man, suffering from a heart attack. (TR. 65.)

The other allegations of this section are supported again by affidavits, largely appellees' own. As indi-

cated above, these are of questionable evidentiary value.

Under Section A (5) pp. 14-16, appellees state, ". . . the principal appellants could show no ultimate facts, but only a few scattered conclusions of fact and suppositions". They refer to appellant's affidavits, with one citation to TR 148, concerning the profits from contracts and from the $1,000,000.00 resulting from failure to do the work. It is conceded by appellant that the $1,000,000.00 figure is a round figure, and represents an unliquidated amount. However, the profits from the contract do not represent an unliquidated figure. Appellees received $3,080,000.00 for the construction of Fairview Manor. They have not denied receiving such payment. They have received this $3,080,000.00, *representing payment in full for the construction,* and they are now trying to deprive appellant of his interest in Fairview Manor (TR 23). They have, by the judgment appealed from, taken the property and are now holding it against the appellant, even though they were paid far in excess of the amount due under the contract.

Under Section A (6) p. 17, appellees state that appellant had antagonized tenants and had been arbitrary toward them, causing vacancies. This statement is supported by reference to TR 88, which is a part of an affidavit of Frank V. Henderson. No other evidence is offered, nor in the record, to support appellees' stand. *They are submitting as a fact in this case the uncorroborated, out of court, uncross-examined statement of one of the principal parties adverse to appellant.*

Section A (7), p. 18, is entitled "No Impossibility of Performing Settlement Agreement", and infers that fifty-five or more vacancies since November, 1953, was the only reason for the statement in the motion to vacate the judgment that the agreement was impossible to fulfill, and so was confiscatory or in the nature of a forfeiture of appellant's interests. This statement neglects to point out that appellant's motion alleges fraud, misrepresentation, lack of consideration, mistake, inadvertence, surprise, excusable neglect, and an overreaching of appellant. (TR 52-55.) Although these allegations may not directly constitute impossibility of performance, they very well could result in a confiscation and a forfeiture. In any event, appellees' statement is specious, since appellant's position is virtually based upon the fraud and overreaching perpetrated upon him while he was ill, and upon the adjudication reached upon the fraudulently obtained stipulation. (TR. 52-55.)

Section A (8) pp. 18-19 suggests a ratification and acceptance of terms and conditions of settlement agreement. However, again, appellees neglect to point out, there was a final decree and order, dated the 10th day of October, 1953, in this case. (TR 45, 46.) The inferred ratification thus consists of nothing more than appellant's failure to violate the decree and order of the District Court. In any event, any suggestion of ratification, even through passive acceptance of the Court's order, should have been dispelled by appellant's motion to set aside and vacate the stipulation and judgment based thereon, and ap-

pellant's amended answer, both filed on January 8, 1954. (TR 47-56.)

Section A (9) entitled "Mechanics Liens" suggests that appellant sought benefits without performing himself. The appellees state, ". . . the stipulation filed in the case provided for assumption by the Mortensens and Henderson of said liens". (p. 20.) However, appellees fail to indicate that the Mortensens and Henderson were already liable for said liens since they had accepted the contract for building Fairview Manor and had accepted full payment therefor, even including the ten per cent (10%) held in escrow to guarantee the payment of subcontractors liens. (TR 144, 151.) When the appellees settled these liens, they were merely settling something that they were already bound to do. (TR. 386-398.)

Section A (10), p. 21, refers to litigation pending and infers the settlement thereof as performance by the Mortensens and Henderson. It should be pointed out that the litigation was that of the appellees primarily, so any settlement benefitted appellees. All of this litigation resulted from the appellees' contract to build Fairview Manor, for which they have received $3,080,000.00, the full contract price. (TR 147.) One of the suits was against appellees in the amount of $699,912.27, for failure to complete the contract for which they have been paid. Appellees' inference that the dismissal of a suit in this amount, *against them,* as being of value to the appellant is contrary to common sense and reason.

Another matter is also relevant to the litigation here. The appellees, by making and filing false and fraudulent affidavits stating that the job was completed, when they well knew it was not, drew the sum of $311,687.68 from the National Bank of Commerce in Seattle. (TR 144, 202, 216.) If this money had not been taken by them, the subcontractor's claims could have been paid. The litigation was the result of their own wrongdoing. (TR 144, 151.) Appellant admits that the references here are to his own affidavit, but submits again that all of the fraud and chicanery involved in this case should be brought out into the light in open court.

Section A (11), p. 22, has apparently been thrown in by appellees for the sole purpose of confusing this court. The appellees well know that an order denying defendant's motion to vacate final judgment, appointing receiver, and directing delivery of Certificates of Stock (TR 252-258) was entered and filed on May 7, 1954, that deprived appellant of all control and interest in Fairview Manor. Why appellees insisted on rehashing the terms of a fraudulently obtained stipulation, which has become merged in the decrees and orders of the lower court (TR 45, 252) is incomprehensible. It is interesting to note that the appellees are not alleging that appellant is violating the decrees and orders, and they ignore the present status of Stock Certificates, control and operation of Fairview Manor. This especially since Judge Pratt, by his judgment, put the appellees into the

possession and complete control of the property, even though there is no denial of the fact that they were paid in full the entire contract price, and by equity and good conscience, should have no interest in the property.

Under Section A (12), p. 23, appellees allege performance on their part of certain terms and conditions of the settlement agreement. They neglect to show, however, that the alleged performance was for the settlement of claims resulting from their own wrongdoing. (TR 288-289.) The appellees were the contractors for the construction of Fairview Manor (TR 386-398), and although they have been paid the full amount of the contract, $3,080,000.00, they had not paid off the subcontractors. They allowed the liens to be placed against the property (TR 288-289), and they are alleging performance of something that they were already bound to do. (TR 387.)

Under Section A (13), pp. 23-24, appellees state that Nowell had apparently performed the terms and conditions of a separate agreement. They also state that this presented no issue in this case. However, if Nowell was a party to the conspiracy as appellant maintains, his activities are definitely in issue in this case. (TR 59.)

Section A (14), p. 24, is entitled "Defaults by Appellants". A more appropriate heading would be "Additional Proof of Fraud in Obtaining Stipulation". Here appellees allege the failure to deposit the nine hundred shares of capital stock of Fairview Development, Inc. They allege the failure to pay

$6800.00 at the time of the execution of settlement agreement; they allege the failure to pay the $3200.00 on or before December 31, 1953; and they allege the refusal to permit Fairview Development, Inc., to pay the $89,000.00; but they fail to state that the so-called default was of an agreement and stipulation taken from a man, sixty-four years of age, who at the time the stipulation was signed, was suffering from a heart attack and was under the effect of drugs (TR 64-65, 94), and this stipulation and the judgment based thereon is the very judgment the appellant is trying to set aside for fraud, misrepresentation, lack of consideration, mistake, inadvertence, surprise, excusable neglect and overreaching, which is clearly shown here.

Another inconsistency exists here with appellees' Section A (8), p. 18. There they infer a ratification of the agreement, but in this section they allege nonperformance by appellant. Thus, appellees infer, appellant both ratified and defaulted, apparently at the same time. In at least one instance, the alleged default occurred first. That concerns the payment of $6800.00 (TR 39) to be paid at the time of execution of the agreement. It seems extremely unreasonable to believe that appellant could default in the first payment of the agreement and then ratify it later. Actually, the appellant never accepted, or ratified, the agreement after recovering from his heart attack and the effect of the drugs. (TR 78, 141.)

Section A (15) pp. 25-26 concerns income. The statements there appear of little importance in mak-

ing a determination of facts in the case. However, there is one aspect of this situation that directly affects the whole case. This is an income received by Fairview Development Incorporated from rentals before the due date of the first payment of the mortgagee. $142,228.15 was paid out by Fairview Development Incorporated for construction work, *which should have been done by the contractor,* and the appellees were the contractors, and this work was covered by the contract, and appellees had failed to fulfill their contract. (TR 387, 214-215.) The appellees have succeeded in bleeding the development corporation of $3,080,000.00, and thus forcing appellant to spend the money in order to keep Fairview Manor operating. (TR 214-215.) There are also other claims, in excess of $1,000,000.00 for work that was not finished by appellees in accordance with the plans and specifications (TR 202) but the $142,228.15 is a definite, liquidated, indisputable sum, directly benefitting the appellees by doing work, finishing the contract that they had been paid to do.

Section A (16) is of no informative value. Nowell is now an adverse party to the appellant. (TR 99, 212.)

Section A (17) p. 27 states, with respect to the Rushlight transaction, ". . . this agreement and note between Rushlight and Cash Cole were not involved in these proceedings nor under the settlement agreement and stipulation made herein." This is clearly false. The whole scheme was consummated by Rushlight the night he approached appellant, while appel-

lant was in his sick bed, and acquired his signature by false representation. (TR 57-58.) The execution of the stipulation and agreement on this particular occasion has not been denied. It was, therefore, one transaction. Obviously, appellees will resort to outright misrepresentation in order to prevent the facts of this case from being aired in open court.

Section A (18), p. 28 states, ". . . all of these claims and counterclaims were the subject involved in this case and were mutually released to the parties hereto." Appellants will agree that appellee tried to avoid the claims through the stipulations and agreements. However, if the stipulations and agreements were fraudulently obtained, then these claims are not settled. It is interesting to note that they didn't deny the claims in this section, particularly the $142,228.15, but alleged the settlement of them through the stipulation. These are all matters which should be brought out in open court.

The appellees in this section (p. 28) deny the misappropriation of funds in construction of Fairview Manor. However, under Article 8 (TR 205) of the building contract (TR 393-394) the appellees waive their liens against the property. Yet they permitted liens to be filed which were not paid off until after obtaining the stipulation from appellant. (TR 85.) Thus appellees misappropriated the funds paid them, namely the $3,080,000.00, since they accepted payment without completing the contract. Another serious misappropriation occurred when Mortensen acquired the $311,687.68, by virtue of a false affidavit,

which stated that there were no liens against the property. (TR 205-206.) This was signed by Mortensen *as President,* where he was in fact Vice-President, which fact was well known to him when he signed said affidavit. The money was released by the bank and F.H.A. waived all requirements of documents required by the contract, Article 12 (TR 396-397.) The violations of the contract, with respect to such dealings lead to the conclusion that questionable transactions were involved, so these are matters that should be heard in open court.

Section A (19), p. 29, is a true statement, as far as it goes. However, they fail to state that the final order in this case deprived appellant of his stock and all right, title and interest in and to Fairview Manor, Inc., ousted him from possession thereof, and placed the appellees in possession. (TR 257-258.) *All this was done without a trial on the merits.*

In Section A (20), p. 29, appellees state that the purpose of this suit was to resolve the deadlock in the conduct and affairs of the corporation (p. 28). This is not a true statement. The true purpose of the suit was to deprive appellant of his property in Fairview Manor, put him out and take possession thereof, which purpose was accomplished. (TR 258.) *It is indeed amazing that appellant could be so deprived of his property without the benefit of a trial.* Appellant cannot impress too highly upon this Court, the manner in which this was done, namely through the use of affidavits and other evidence which was uncross-examined material.

The other allegations in this statement are nothing more than allegations. They are charges that have never been proved by anything more than the affidavits of appellees. Appellant has never been given a chance to refute these charges by a trial of the issues in this case. The lower court did make some adverse findings of fact (TR 247), *even though the issues were never tried,* which, in our humble opinion, shows the bias and prejudice feelings of the trial judge.

Section A (21), p. 31, is false and misleading in the following respects: Appellees state that the sole investment of Nowell and Cole was securing a lease for seventy-five years on the land from the City of Fairbanks, and a temporary commitment. Appellant put in fifteen months' work and $10,000.00 in promoting this development. (TR 199.) The statement is clearly false and misleading.

This particular section also states, ". . . and a temporary commitment, apparently for an F.H.A. mortgage." Appellees use the term of "apparently" only to mislead, since they know that an F.H.A. commitment was given. That was the basis of the whole project, and the appellees took advantage thereof.

Under Section B, pp. 31-33, appellees allege controversies existing at the time of filing suit, trial, and settlement. However, the only controversy existing now is whether appellant is to be deprived of his property without a trial on the merits. Appellees refer to a trial (p. 33), but it was merely the start of a trial. *Appellant has never been allowed to bring*

evidence into open court on the issues involved. The final order was issued by the lower court over appellant's objections and without his being heard on the issues here. The act of the lower court, in effect, was to penalize appellant for his unfortunate physical condition, which resulted in a heart attack. Appellant has filed a cross-complaint (TR 103-132), dated February 22, 1954, which brings out the true issues and controversies of this case. The lower court has refused to hear it. (TR 250.) We do sincerely hope this court will read this cross-complaint in connection with the reading of this brief.

SUPPLEMENTARY STATEMENT.

The following statement is clearly supported by the transcript, the statements of fact set out in this brief, the appellant's first brief, and the brief of appellees.

It should be borne in mind that the contractors, who are the appellees in this case, left and moved away from the buildings in December, 1951, although the buildings were not completed, all of which was well known to the contractors, and during the winter of 1951-52, to perpetuate the project and keep it operating the corporation had to pay from the rents and profits from said building, more than $141,000.00. (See TR 214, Ex. A, TR 105, TR 128, TR 301-304.)

Thus the management of the building was forced to expend great sums of money that rightfully belonged to the corporation's surplus bank account to

do work that the contractors failed to do, by failing to finish the buildings. The buildings had to be finished to the extent of over $141,000.00, so they could be kept rented and earning an income. Therefore, the appellees received the benfit of more than $141,000.00 that winter by the corporation expending that amount of money to do the work of the contractors, who are appellees here. (TR 271, Paragraphs 3 and 4, TR 272, Section "C," Paragraph 7, TR 583, last paragraph, TR 584, also TR 145, 147 and 148.)

When all of this money was spent to do the contractors' unfinished work, then the contractors moved in to deprive the appellant of all of his interest in this property, which by the orders of the trial court, was accomplished. (TR 145, TR 1, paragraph 148.) When it became necessary for the transfer of the mortgage to the long-time investor, it was necessary to show that all bills were paid, and that there were no liens against the property. At that time the records showed there were $470,000.00 in liens against the property, and that the property had not been completed according to plans and specifications. No acceptance by the Federal Housing Director, and none by the regular constituted authorities of the Fairview Development, Inc. No resolution from the Board of Directors accepting the project, but, on the contrary, objections were filed, refusing to accept the building as completed. (TR 150-151.)

There was supposed to be up in escrow in the bank, $311,687.68, to be held there until the final payment of all lienable items had been made. The strange

thing about this is that the records in the bank show that a cashier's check was released May 1, *1952,* for $311,687.68, to Fairview Development, Inc., and cashed by the unauthorized signature of Cliff Mortensen. Also, the sum of $10,125.49 was released May 7, *1952.* (TR 216, EX. "B".)

There can surely be no doubt that these funds were released to the Mortensens as stated in Lofquist's letter (TR 216, Ex. "B"), yet, on the *12th day of August, 1953*, over a year later, Frank V. Henderson made an affidavit that the liens were protected by a cash escrow deposit (TR 328) but, according to the certified accountant's statement, these sums of money showed up as a credit in Mortensen's books, as having been received by them April 29, 1952, and May 7, 1952. (TR 216, Ex. "B".)

On August 10, 1953, Cliff Mortensen made an affidavit which conflicts with the above record. (TR 313, Paragraph 11.) The liens were not paid until some time after October 9, 1953. (TR 84-85, Paragraph 22.) Someone must have falsified considerably.

The apparent deadlock referred to in appellees' brief was brought about by the acts of Cliff Mortensen in attempting to take all of the interest of Cole and Nowell, and to deprive them of any authority in the operation of the project, and stop the Board of Directors from being able to transact any business. (TR 164, Ex. "A".)

On June 15, 1950, a contract was entered into between Bayview Realty, Inc., Cash Cole, and Everett

Nowell, as parties of the first part, and Nelse Mortensen, Frank Henderson, and Cliff Mortensen, as parties of the second part, wherein it was agreed that, upon completion of the housing project, Bayview Realty, Inc., should have the management and operation of the housing project in behalf of Fairview Development, Inc. (TR 24, Paragraphs 9 and 10.)

Then Mortensen attempted to ignore this contract (TR 24, Paragraph 10), and has breached the terms thereof.

CHRONOLOGICAL SCHEDULE.

For the convenience of the Court and in order to apprise this Court more fully of the various pleadings and transactions which have taken place in this case, we have set forth below all material in the record in a chronological order. The dates are those of execution, where applicable.

We feel that this schedule will give the Court a clearer concept of each transaction with respect to the others, at least as to the time. Although this information is in the record, it is our belief that the setting forth in chronological order will assist in getting at the facts of the case.

It should also be pointed out that this schedule could not have been put in appellant's brief, since the supplemental transcript was not available to appellant at the time of writing appellant's brief.

Date	Instrument	Page of TR	Executed By
July 10, 1950	Construction Contract	386	Appellees and App
October 31, 1952	Complaint	3	Walter Sczudlo
November 12, 1952	Appearance	277	Hellenthal and Mor
December 17, 1952	Answer	15	Morrissey, Hedrick, Roberts and Dun
June 22, 1953	Affidavit	280	Cliff Mortensen
June 25, 1953	Motion for appointment of Receiver	278	Walter Sczudlo
July 23, 1953	Complaint	375	John E. Hedrick
August 3, 1953	Affidavit	21	Cash Cole
August 3, 1953	Affidavit	288	Everett Nowell
August 7, 1953	Affidavit	295	Cash Cole
August 7, 1953	Affidavit	290	Cash Cole
August 7, 1953	Affidavit	300	Cash Cole
August 10, 1953	Affidavit	360	J. E. Swanson
August 10, 1953	Affidavit	304	Cliff Mortensen
August 11, 1953	Affidavit	329	J. F. Campbell
August 11, 1953	Affidavit	314	Cliff Mortensen
August 12, 1953	Affidavit	317	Frank Henderson
October 5, 1953	Transcript	462	Cash Cole
October 8, 1953	Transcript	549 and 564	Mrs. A. Scott
October 8, 1953	Order appointing Receiver	368	Appellees and App
October 10, 1953	Final Decree and Order	45	District Judge
October 28, 1953	Stipulation and Order of Dismissal	399	Joe Diamond, Joh rick and Judge
December 15, 1953	Notice of withdrawal of Attorneys	371	Nicholas Jaureguy
January 7, 1954	Affidavit	56	Cash Cole
January 7, 1954	Affidavit	61	Tom Cole
January 7, 1954	Affidavit	64	Joseph Ribar, M.
January 8, 1954	Amended answer	47	Warren Taylor (Cash Cole)
January 8, 1954	Motion to Vacate	52	Warren Taylor
February 9, 1954	Notice of Default and Demand	371	Nelse Mortensen, Cliff Mortensen Frank Henders
February 10, 1954	Affidavit	92	Josef Diamond an Earle Zinn
February 10, 1954	Affidavit	86	Frank Henderson

Date	Instrument	Page of TR	Executed By
ary 10, 1954	Affidavit	66	Cliff Mortensen
ary 10, 1954	Affidavit	94	Joseph Ribar, M. D.
ary 11, 1954	Affidavit	95	Everett Nowell
ary 12, 1954	Motion for Receiver	101	Walter Sczudlo
ary 12, 1954	Motion to Show Cause	373	Walter Sczudlo
ary 20, 1954	Affidavit	166	W. A. Rushlight
ary 22, 1954	Cross Complaint	103	Bell, Sanders, Taylor (Cash Cole)
ary 26, 1954	Affidavit	143	Cash Cole
ary 26, 1954	Affidavit	156	Cash Cole
ary 26, 1954	Affidavit	140	Ruth Cole
ary 26, 1954	Affidavit	132	Tom Cole
ary 26, 1954	Affidavit	171	Allene Hendricks
3, 1954	Affidavit	172	Everett Nowell
5, 1954	Affidavit	177	Cliff Mortensen and Frank Henderson
16, 1954	Affidavit	187	Everett Nowell
19, 1954	Affidavit	190	Cliff Mortensen
19, 1954	Amended Motion for Appointment of Receiver	183	Walter Sczudlo
2, 1954	Affidavit	195	Cash Cole
1954	Findings of Fact and Conclusions of Law	228	District Judge
1954	Order Denying Motion to Vacate, etc.	252	District Judge
1954	Notice of Appeal	264	Warren Taylor
, 1954	Order	261	District Judge
, 1954	Motion to Strike Notice of Appeal	401	Walter Sczudlo
, 1954	Receiver's Petition	402	Robert E. Sheldon
, 1954	Order on Petition	410	District Judge
, 1954	Notice of Hearing	261	Walter Sczudlo
, 1954	Order Setting Bond	264	District Judge
1954	Transcript	572	Court Reporter
1954	Motion to Strike Name	259	Warren Taylor
, 1954	Receiver's Monthly Report	412	Robert E. Sheldon
, 1954	Order	260	District Judge
, 1954	Statement of Points	271	Warren Taylor

REPLY ARGUMENT.

Appellees' Brief, Section I, Sub-sections 1-6, can be treated under one heading in this reply. They all deal with the question of vacation of the decree in this case. *Assman v. Fleming,* 159 F. 2d 332, has been relied upon by the appellees to quite some extent. That case, however, involves the request for the vacation of a consent judgment, wherein oral testimony was allowed on the issues raised by the motion to vacate the judgment. (id. 335.) As indicated in appellees' brief, page 46, the findings of that court were sustained by substantial evidence, and could not be held to be an abuse of discretion. But that is not the case here. No oral evidence or testimony of any nature was given in this case on the question of vacating the judgment. The findings of fact and conclusions of law in this case were based solely on affidavits and other instruments in the record. In the *Assman* case, the court had a chance to see the witnesses, to hear them testify, to observe their demeanor under close observation, and even, if the court so desired, to question the witnesses himself. Here, the court had nothing but cold affidavits and other instruments upon which to base its findings and decree.

The order denying defendant's motion to vacate final judgment; appointing receiver; and directing delivery of Certificates of Stock, was, in effect, final. That order deprived appellant of all interest in Fairview Manor. (TR 257-258.) Unless that order is changed, appellant will be forever deprived of his

property. Perhaps the court has been misled because of the practice in the District Courts of Alaska. The courts here normally refuse to hear testimony in cases where interim relief is requested. The show cause orders and other interim relief requests are usually supported by affidavits. The theory, of course, is that the courts do not wish to "try each case three or four times". This practice does prevent the waste of the court's time, but such a practice should not be used in cases involving the final disposition of litigation. Where the relief desired is truly interim, the parties thereto always have their day in court at the final trial. Here, the denial of the motion to vacate was final.

It is true that the burden of proof is on appellant, but appellant must have a chance in court to carry this burden of proof.

Under Sub-sections 5 and 6, appellees have indicated that there was not sufficient proof of fraud, conspiracy and other acts and of the mental incompetence of appellant. However, again, appellant must have his day in court with which to show such evidence. There can obviously be no evidence when none is allowed.

In Sub-section 5, appellees have referred to *Alaska Northern R. Co. v. Alaska Central Co.,* 5 Alaska 377; *American Finance & Commerce Co. v. Gorden,* 1 P. (2d) 886, 164 Wash. 45; *Cerkonek v. Dibble* (Wash.), 256 P. (2d) 488; *Bonzelman v. Northwest Poultry & Dairy Products Co.,* 225 P. (2d) 757; *Tecklenburg v. Washington Gas & Electric Company* (Wash. 1952),

241 P. (2d) 1172; *Travelers' Ins. Co. of Hartford, Conn., v. Byers* (Calif.), 11 P. (2d) 444, and *Handley v. Handley,* 243 P. (2d) 204. The first case, cited as 5 Alaska 377, cannot be found in the Reporter at page 377, nor for that matter, anywhere in Volume 5 of Alaska Reports. All the other cases cited involve the taking of testimony before the court. None of these were tried and determined on affidavits. In the case of *Handley v. Handley,* the court stated at p. 209, in reference to *Waller v. Julius,* 68 Kansas 314, 74 P. 157:

> "That case reached this court by appeal from an order sustaining a demurrer to plaintiff's petition, which, briefly stated, alleged that the deed was without consideration and the grantor at the time of making it was of unsound mind and incapable of transacting any business whatsoever and did not know what she was doing, which facts were known to the grantee. Other facts were alleged as to plaintiff's interest in the property and her right to maintain the action. By reversing the trial court this court simply held that plaintiff was entitled to a trial upon her petition. Possibly a similar holding would have been made if a demurrer had been filed to the petition in this case. However, that was not done. An answer was filed *and plaintiff offered all his testimony. . . .*" (Emphasis supplied.)

The citations in this section of appellee's brief, therefore, do not support appellees' position and are not directly in point, as they have stated, since there was no testimony or evidence other than affidavits upon which the court could base its decision.

The appellees' subsection 6 is also subject to the same error. The cases cited there are also cases that involve a trial before the court. Appellees' subsection 6 is headed, "There is no clear, cogent and convincing proof, etc." This may or may not be true, but it should be determined by sworn, cross-examined, in-court testimony. In any event, the question of the mental competence of Cash Cole may not be determinative, since fraud and overreaching could be perpetrated upon an individual who need not necessarily be mentally incompetent.

Under Sub-section 7, the Appellees infer that the settlement agreement cannot be rescinded without restoring Appellees to status quo. However, this is not an absolute rule.

> "Fraud or bad faith is material, to the extent that a contract or conveyance can be avoided on the ground of incompetency even in the absence of a surrender or offer to surrender the consideration received, in a case where the party against whom the avoidance is sought was guilty of fraud or undue influence, or secured the contract or conveyance with knowledge of the incompetency of the other party or of the grantor." (28 A.J. 726, Sec. 90.)

In this same section Appellees state:

"Restoration of status quo, or benefits is a prerequisite." This, too, is a general rule and there are many exceptions to it.

> "The rule requiring restoration of the status quo upon rescission has been held not to be applicable in certain instances where there has been fraud

> in the factum of the instrument sought to be avoided or where the defendant has obtained the plaintiff's property under the guise of a contract which is wholly wrongful." (24 A.J. 18, Sec. 197.)

This section of appellees' brief also, as indicated above, refers to cases, the issues of which were tried upon testimony and evidence before the court. That, again, distinguishes the cases cited from the case herein.

In the final analysis the arguments under appellee's sub-section 7 are moot. Appellant never received any benefits from the agreement. The alleged performance on the part of the appellees consisted of payments to third parties. (See appellant's Reply Brief, Statement of Facts, at Page 6.) Most important of all, however, is that the appellees were already bound to pay off the liens involved under the terms of the original construction contract. (TR 386-398.)

Appellees' Sub-section 8 argues that appellant affirmed or ratified the settlement agreement. Their argument essentially is that appellant's failure to give a written affirmance of the Stipulation and Decree within a period of three (3) months after the execution operates as a ratification. Under the facts of this case such an argument is without merit. The Motion to Vacate, filed January 8, 1954, slightly less than three (3) months after the filing of the final Decree and Order, was the written disaffirmance. However, appellant was suffering from a heart attack

during this period. His attorneys had ceased working on the case and withdrew during this period (TR 371), and appellant did nothing to indicate that he had ratified the Stipulation. The litigation in this case was started by appellees on October 31, 1952. (TR 3.) In such a long, drawn-out case, a period of less than three (3) months should not be considered an unreasonable time within which to file the written disaffirmance.

Appellees refer to 28 A.J. 709-710, Sec. 77, which states at page 710:

> "As a general rule, one who seeks a rescission or cancellation of an instrument in equity will be required to give notice of disaffirmance before bringing suit only when such notice is necessary for the protection of one who has acted in good faith."

Under such a rule, no disaffirmance would be necessary if the appellees were guilty of fraud and overreaching.

Appellees also support their position in this section with a reference to *E. J. Albrecht Company v. New Amsterdam Casualty Company,* 163 F. (2d) 16. The citation is not in point. The case referred to involves parties who continued to deal with each other even after the alleged claim arose, and, in addition, suit was not brought until two (2) years after the claimant had left the job. In the case herein the appellant not only had ceased dealing with the appellees, but had taken positive action to disaffirm within a period of less than three (3) months.

Appellees' argument under Section II is unsound. Here the appellees are claiming that the issues raised by appellant's Cross-Complaint were *res judicata*. It is difficult to see how these issues could be *res judicata* if the Motion to Vacate is granted. The issues would still be before the Court. In any event, the question of whether the issues in the Cross-Complaint were *res judicata* or not appear unimportant. This is not a trial of a case but an appeal.

Under Section III, the appellees state that the appointment of a Receiver for Fairview Manor is not a proper matter for review on this appeal. However, they did see fit to devote nine (9) pages in an attempt to controvert appellant's brief on this particular point. Most of the matters discussed by appellees are well covered in appellant's brief, but several new allegations should be answered. Appellees allege large expenditures and extravagance, III, Sec. 3 (a), personal gain and unnecessary salaries, III, 3 (c), conversion through salaries and expenses, III, 3 (d), and scheme of unfair operations III, 3 (g). There is no showing in the record that Cash Cole received any profits or earnings other than the $1,000.00 per month that he was entitled to under the management contract with the appellees. (TR 298.) Cash Cole received $1,000.00 per month for the management of a more than three million dollar project in an area where common laborers earned more than $1,000.00 per month. It should also be borne in mind that during the period in which Cash Cole was man-

aging this property, the appellees succeeded in bleeding the development of $142,228.15 indirectly and $311,687.68, a sum left in escrow for the payment of lien claims. (See Statement of Case, supra.)

Appellees also infer, III, 3 (f), the lack of corporate audit or statement. This is baldly misleading. Fairview Manor was financed by a loan of more than three million dollars from Institutional Securities Corporation. The loan was guaranteed by FHA. Although it does not appear clearly in the record, it seems extremely doubtful that both FHA and the mortgagee, with an interest in this amount, would permit the management of the project to get by without a proper corporate audit or statement. To date neither Institutional Securities Corporation nor FHA have intervened in the litigation involved in this case.

Since the issues in this case were never tried, the lower court did not have sufficient information concerning the whole transaction to enable him to properly determine whether a Receiver should be appointed or not. The following indicates, to some extent, the lower Court's knowledge of the facts of this case:

> "The Court. You may—just mind telling us just us what all matters should be secured by this supersedeas bond? What are the matters?" (TR 575-576.)

Mr. Sczudlo answered.

> "The Court. How is that money taken care of?" (TR 576.)

Mr. Sczudlo answered.

"The Court. Is there any mortgage on the property?" (TR 577.)

Mr. Sczudlo answered.

"The Court. Who is the Mortgagee?" (TR 577.)

Mr. Sczudlo answered.

"The Court. Very well." (TR 577.)

Mr. Sczudlo answered.

Later on in the Transcript, the following took place:

"The Court. Well, then, the matter will be decided for the present by an Order Denying the Motion?

Mr. Sczudlo. No, it will be decided by an Order Allowing the Motion, that is, to strike the Fairview Development Company from that Notice of Appeal.

The Court. Oh, it is to strike it from the Notice of Appeal?

Mr. Sczudlo. Yes, sir.

The Court. That is what your motion is for? All right, your motion is denied, then.

Mr. Sczudlo. The motion is denied sir, or granted?

The Court. It is granted." (TR 583-584.)

Although the lower Court cannot be expected to remember everything, the Transcript of Proceedings of June 4, 1954, seems to indicate that the lower Court knew little or nothing of the facts of this case.

CONCLUSION.

In conclusion, we feel that the appellees have failed to refute the matters set forth in appellant's brief and respectfully submit that, in the interests of justice and equity, the decision of the lower Court should be reversed.

Dated, Anchorage, Alaska,
August 4, 1955.

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